



April 25, 2020

BY FOIA ONLINE

BY EMAIL: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

RE: FOIA request regarding Covid-19 and EPA Enforcement

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), we request copies of all of the following records<sup>1</sup> prepared or received by EPA after March 1, 2020:

1. All records regarding any specific instances of actual or potential violations of environmental laws or rules that have been attributed or linked by any person or entity to the Covid-19 pandemic ("Covid");
2. All records regarding specific requests for EPA to withhold or relax enforcement action due to the actual or potential effects of Covid on compliance with environmental laws or rules.
3. All records prepared by EPA officials or employees interpreting, explaining, or identifying supporting facts or rationales for the EPA Memorandum of March 26, 2020 from Susan Parker Bodine to All Governmental and Private Sector Partners re: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program, posted at <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf> ("Memorandum").
4. Any communications between any EPA official or employee and any person or entity outside the agency regarding or relating to EPA's preparation of the Memorandum, EPA's decision to issue the Memorandum, or EPA's implementation of the policies set out in the memorandum;
5. All records regarding any decision regarding enforcement (including any decision not to enforce) made in reference to, or in reliance upon, the Memorandum and all communications between any EPA official or employee and any person outside the agency related thereto.

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<sup>1</sup> As used throughout this letter, the terms "record" and "records" shall mean all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored) in EPA's possession, including, but not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, tapes, photos, videos, and telefaxes. Note that this request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by any federal employee or official if used for any government purpose.

This request extends prepared or received by EPA up to and through the date or dates that you conduct the search for records. You may exclude from this request any records that are publicly available on EPA's website. It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please contact me to discuss this possibility. In addition, to the extent that records responsive to this request are available in a widely-used electronic format (e.g., pdf, Excel, Word, or other common electronic formats), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the nation's environmental laws.

We also request that responsive records be released as soon as they are available, but in no event later than 20 days as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

### **REQUEST FOR FEE WAIVER**

This FOIA request is submitted by Earthjustice, a nonprofit environmental law organization. Earthjustice works through legal advocacy and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change.

Earthjustice requests that you waive all fees in connection with this matter. As shown below, Earthjustice meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee waiver regulations at 40 C.F.R. § 2.107. In particular, disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

#### **I. The subject of the requested records concerns "the operations or activities of the government."**

The subject matter of this request relates to EPA's policy pertaining to enforcement of environmental laws and rules during the Covid pandemic. It is clear that such a policy, as well as EPA's overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) ("[R]easonable specificity" is "all that FOIA requires" with regard to this factor.). Thus this FOIA request plainly concerns the operations or activities of the government.

#### **A. The disclosure is "likely to contribute" to an understanding of government operations or activities (the informative value of the information to be disclosed).**

There is no question that the records requested will contribute to an understanding of federal government operations. The request likely will result in disclosure of records not already in the public domain. The requested records will provide important information regarding the factual, legal and policy grounds for EPA's policy of enforcement discretion relative to the Covid pandemic, and regarding EPA's explanation and interpretation of that policy. Such information will allow better understanding of government operations, and in particular, why, and the extent to which, EPA has chosen to exercise discretion not to enforce a wide range of the nation's environmental laws and rules in a variety of situations during the Covid pandemic. The records are likely to also disclose specific facts relevant to the need for the policy, how the policy was developed, who had input into its development, and how EPA intends to interpret and implement the policy. These records are not publicly available as a general matter. Thus, production of the requested records is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In *McClellan Ecological Seepage Situation*, 835 F.2d at 1286, the court made clear that "[FOIA] legislative history suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations." In this instance, the requested records will likely provide new information on the matters cited above. The records sought are not posted on EPA's web site (the request specifically excludes records already posted thereon), and to our knowledge they have never been provided or made readily available to the public. See *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 n.2 (D. Idaho 2004) ("WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding."); see also *Community Legal Services v. HUD*, 405 F. Supp. 2d 553, 560 (D. Pa. 2005) ("Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.") (citing *Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005))

**B. The disclosure of the requested information will contribute to "public understanding."**

The information requested will contribute to public understanding of the basis for, and EPA's development, interpretation, and implementation of the Memorandum. The information requested will also help provide Earthjustice, its members, and the public that Earthjustice disseminates information to with insight into the rationale for, meaning, and impact of the Memorandum. The information's release is not only "likely to contribute," but is in fact certain to contribute significantly to better public understanding of the operations or activities of the government as described above. 5 U.S.C. §552(a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2). The requested records will likely provide new information about the development of, interpretation, and impact of the Memorandum. See *McClellan Ecological Seepage*. Accordingly, the records sought by this request will provide important oversight of EPA operations by revealing specific facts and reasons that EPA relied on developing the Memorandum, details as to how EPA intends to interpret and apply the Memorandum, and the effect of the Memorandum on

environmental compliance. Also, as the request here specifically excludes material that is already publicly available on EPA's web site, the disclosure sought will likely provide new information of which the public is not already aware. See *Community Legal Services*, 405 F. Supp. 2d at 560 (“[T]he CLS request would likely shed light on information that is new to the interested public.”).

Public understanding of the new information will be achieved because Earthjustice intends to use the new information that it receives to educate the public by informing the public about what the records reveal about EPA's development and interpretation of the Memorandum, and about its actual impact in terms of enforcement and environmental compliance/noncompliance.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). Earthjustice need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for Earthjustice to show how it distributes information to the public generally. *Id.*

Earthjustice is a non-profit organization that informs, and educates the public regarding environmental issues, policies, and laws relating to environmental protection. Earthjustice has been substantially involved in such activities for years and has consistently displayed its ability to disseminate information granted to it through FOIA.

Earthjustice possesses the expertise to explain the requested information to the public and the ability to disseminate the requested information to the general public (*e.g.*, Earthjustice has attorneys and other professionals who have the ability to assess and digest the requested information, and Earthjustice has the capacity to publish reports regarding that information). In addition, Earthjustice's informational publications are disseminated to the media and are available on Earthjustice's website to the general public.

The records sought in this FOIA request will be used to assess EPA's basis for, and interpretation of the Memorandum, and how the EPA is implementing its obligations to enforce environmental laws that affect people and businesses across the nation.

Earthjustice intends to publicize the significance of the matters that are the subject of the records disclosed, the nature of the facts, issues and positions identified in those records, and EPA's actions related thereto. This is certain to result in a significant increase in public understanding of government agency activity. Earthjustice has publicized agency activities with respect to implementation of various environmental laws many times through information gained from FOIA requests like this one. Earthjustice intends to use the records sought in this request in a similar manner. Information such as that presently requested is often disseminated through Earthjustice's newsletter and website (Earthjustice.org), which typically receives more than 300,000 page views each month, news releases, and social media outlets including Facebook and Twitter. Earthjustice's informational publications continue to contribute information to public

media outlets, as well. Information obtained in this request will likely be disseminated through all of these means. The courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. *See Forest Guardians*, 416 F.3d at 1180 (“Among other things, Forest Guardians ‘publishes an online newsletter, which is e-mailed to more than 2,500 people’ and stated that it ‘intend[s] to establish an interactive grazing web site’ with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public’s understanding of the BLM’s operations and activities.”).

**C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.**

Earthjustice’s track record of active participation in oversight of governmental agency activities and its consistent contribution to the public’s understanding of agency activities as compared to the level of public understanding prior to disclosure is well established. See, e.g., information provided at [www.earthjustice.org](http://www.earthjustice.org).

The requested information is likely to shed light on EPA’s basis for and interpretation of the Memorandum, and the impact of the Memorandum on compliance with environmental laws. The public’s understanding of these matters, as compared to the level of public understanding existing prior to the disclosure, will be significantly enhanced by the dissemination of this information. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Earthjustice is not requesting these records merely for their intrinsic informational value.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney*, 19 F.3d 807. As explained above, Earthjustice often disseminates information such as that presently requested through a variety of means to wide audiences, and intends to do so here.

**II. Obtaining the information is of no commercial interest to Earthjustice.**

Access to government records and similar materials through FOIA requests is essential to Earthjustice’s role of educating the general public. Earthjustice, a non-profit, 501(c)(3) organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

For all the foregoing reasons, dissemination of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government. Accordingly, we request that you waive all fees in connection with this request pursuant to 5 U.S.C. §552(a)(4)(A)(iii).

If you deny this fee waiver request, in whole or in part, please notify us before incurring search and copy expenses.

## Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to contact me at 202-745-5203 or by email at [dbaron@earthjustice.org](mailto:dbaron@earthjustice.org).

Thank you for your assistance.

Sincerely,

*/s/David S. Baron*

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